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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

H. L. MOORE DRUG EXCHANGE, division of/and LEVITT INDUSTRIES, INC.,

Petitioners,

VS.

ELI LILLY AND COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MILTON A. BASS
JACOB LAUFER
I. SCOTT BASS
LAWRENCE H. ROTH
Bass, Ullman & Lustigman
Attorneys for Petitioner
H. L. Moore Drug Exchange
747 Third Avenue
New York, N.Y. 10017
(212) 751-9494

QUESTIONS PRESENTED

1. Whether the "combination or conspiracy" portion of a Sherman Act vertical conspiracy case has become an issue of law requiring direct evidence, by reason of *GTE Sylvania*?

2. Whether a Court of Appeals which reverses a verdict may deprive the verdict winner of a requested opportunity to make a new trial motion in the District Court?

STATEMENT PURSUANT TO SUPREME COURT RULES 21 AND 28.1

The parties to the proceedings are those listed in the caption, except that the parent company of petitioner H.L. Moore Drug Exchange is now known as Optel, Inc. instead of Levitt Industries, Inc.

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OPINIONS BELOW

The following opinions of the Court of Appeals and of the district court are set forth in the appendices in chronological order:

The opinion of the district court denying Lilly's motion for summary judgment is reported at 1979-1 Trade Cas. [CCH] ¶ 62, 674 (1979) and is set forth in Appendix A.

The opinion of the district court denying Lilly's motion for judgment *n.o.v.* and for a new trial is reported at 1980-2 Trade Cas. [CCH] ¶ 63,300 (1980) and is set forth in Appendix B.

The opinion of the district court granting an injunction against Lilly is reported at 1980-81 Trade Cas. [CCH] ¶ 63,652 (1980) and is set forth in Appendix C.

The opinion of the Court of Appeals reversing the denial by the district court of Lilly's motion for judgment *n.o.v.* and for a new trial is officially reported at 662 F.2d 935 (2d Cir. 1981) and is set forth in Appendix D.

The judgment entered by the Court of Appeals is set forth in Appendix E.

The order denying Moore's petition for rehearing, not officially reported, is set forth in Appendix F.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on October 16, 1981. Petitioner filed a petition for rehearing with a suggestion for rehearing *en banc*, which was denied without opinion on December 30, 1981. This Court granted petitioner's two motions for extensions of time in which to file the instant petition. The Orders granting the extensions are dated March 19 and May 7, 1982 and provide for an extension until May 28, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The federal statutory provisions involved are:

(a) Section 1 of the Sherman Act, 15 U.S.C. § 1, which states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one

hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(b) Rule 50 of the Federal Rules of Civil Procedure, which provides, in relevant part:

> **(b) Motion for Judgment Notwithstanding the Verdict.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.
>
> **(c) Same: Conditional Rulings on Grant of Motion.** (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order

thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) **Same: Denial of Motion.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

STATEMENT OF THE CASE

At issue in this case is a doctrine[1] which removes from the jury the question of whether there was a vertical "combination or

[1] The Second Circuit recently handed down a decision in *Schwimmer v. Sony Corporation of America*, ___ F.2d ___, Dkt. No. 81-7135 (2d Cir. May 3, 1982), which raises some of the same issues. The *Sony* decision is appended to petitioner's motion for an Extension of Time In Which To File Petition For Certiorari in the instant case. A petition for *certiorari* will be filed in that case as well. Petitioner has filed a Motion for Deferral of Consideration in order to have both petitions considered jointly.

conspiracy" in Sherman Act Section 1 cases. Apparently relying upon its interpretation of this Court's decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[2] the Second Circuit has made that threshold issue a legal one which must be established by direct evidence. This reading leaves the reasonableness of the restraint as the factual issue for the jury.

What the Second Circuit did in this case is yet another in a series of recent decisions in which that court has assumed the position of fact-finder in order to reach a desired legal result.[3] In substituting its judgment for that of the jury in this case, however, the Court of Appeals has done more than merely ignore the accepted standard of appellate review; the Second Circuit's direct evidence ruling contravenes an established body of antitrust law which, as Professor Areeda has noted, is "[p]erhaps the most litigated issue under the antitrust laws . . ."[4]

The Second Circuit's assumption of the fact-finder's role also brings to bear a decisive inconsistency in the Federal Rules of Civil Procedure. Moore, the verdict winner, never had an opportunity to have the trial judge entertain a new trial motion. This is particularly crucial because the court had excluded direct evidence of the conspiracy. By directing entry of judgement against Moore, the Court of Appeals deprived Moore of the district court's discretion with respect to new trial issues.

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The H.L. Moore Drug Exchange ["Moore"] was an innovator in the wholesale drug field. Moore pioneered the use of a mail order catalogue, enabling it to sell on a nationwide basis. It achieved those nationwide sales because it offered lower prices

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[2] 433 U.S. 36 (1977)

[3] *See, e.g., Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 638 F.2d 538 (2d. Cir. 1981), *cert. granted*, — U.S. —, 71 L.Ed. 2d 107 (1981) (No. 80-2182, 1981 Term) [another decision by Judge Mansfield which is currently pending before this Court], and *Schwimmer*, note 1 *supra*.

[4] P. Areeda, *Antitrust Analysis* 553 (2d ed. 1974)

than the local wholesalers in whose trading areas Moore sold. In an era of little price competition and enforced Fair Trade, Moore was the first wholesaler to discount prices on major pharmaceutical products.

Moore is a full-line wholesaler, which means that it must offer all of the top pharmaceutical lines in order to retain its customers. Lilly is the foremost manufacturer of pharmaceutical products in the United States, offering essential medications such as Darvon®, Keflex®, and other top-selling items. Since the 1950's, Moore has fought an uphill battle in order to obtain directly from Lilly the pharmaceutical products which it requires.

Lilly refused to sell to Moore from the outset, as did most major manufacturers. Lilly's stated reason then was that it did not sell to wholesalers who did not belong to the National Wholesale Druggists Association ["NWDA"]. This was a "Catch-22" excuse, for the NWDA refused to accept Moore because it was not a direct account of manufacturers such as Lilly.

For years Moore obtained the necessary Lilly line from other wholesalers. By the mid-196[illegible], however, Moore noticed that a number of its suppliers discontinued sales to Moore of major manufacturers' products. Moore discovered that Lilly had obtained the identities of Moore's suppliers, who thereafter refused to sell to him.

In 1966, Moore sued Lilly and the other manufacturers, alleging an antitrust conspiracy among those who cut off sales to Moore. The evidence revealed that a number of the companies had hired a spy in order to ascertain who was selling to Moore. The spy supplied manufacturers, including Lilly, with the identity of Moore's sources of supply. Lilly was one of the companies which paid for the reports.[5]

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[5] The foregoing evidence as to the spy was excluded by the district court. This exclusion forms part of petitioner's argument in Part II, *infra*, as to why a remand was proper in this case.

Moore and Lilly settled the case in 1971. Lilly agreed to sell to Moore as part of that settlement.

Lilly's begrudging agreement to franchise Moore immediately met with complaints from other wholesalers who did not sell at prices as low as Moore's. Indeed, they could not, for as Lilly's principal witness (Robert Manning) testified, if all wholesalers discounted it would "probably cause the bankruptcy of a lot of wholesalers." Manning acknowledged that because of Moore, there had been "some economic bruising taking place." [Appendix D at p. A74]

And that was precisely what occurred. A particularly vigorous source of the complaints was the D.A. Rosow Company. Rosow told Lilly he was upset about having Moore franchised in "his" trading area, about Moore's marketing methods ("What's Lilly going to do about it?"), and about other of Moore's practices. The source of Rosow's annoyance was, however, best described by Harold Katz, the Lilly salesman in charge of the region: "I think price was always involved."

Mr. Katz later admitted to Moore that Moore was a "thorn in the side of Lilly, that they get all sorts of complaints about [Moore], . . . and [Katz] gets a lot of blame for it because merchandise he [Moore] is selling . . . in New Britain, Connecticut goes out of the State."[6]

While Moore was a franchised Lilly wholesaler, it was required to go along with two Lilly policies which restricted resale of Lilly's products. The first was Lilly's "Special Deals." These were promotional offers involving some of Lilly's most important products, such as Penicillin V® and Darvon®. The "Special Deals" provided a large discount and long payment terms. Special Deal merchandise accounted for a huge percentage of Lilly wholesalers' annual purchases. Any wholesaler without the discounted merchandise was thus unable to compete for a major share of retail business.

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[6] This crucial evidence was excluded by the trial court "for the time being." Because of Rule 50(d) F.R.Civ.P., Moore never had the opportunity to have that evidence considered. *See* Part II of this Petition and footnote 5, *supra*.

Lilly explicitly refused to sell Special Deal merchandise to a wholesaler if the wholesaler sold to "*non*-Lilly wholesalers or any firm which resells to other dealers." [Appendix A, p. A17]. Lilly had few, if any, wholesalers serving the same local area. Lilly was thus preventing wholesalers such as Moore from selling large-volume merchandise to wholesalers in other territories (who could in turn compete with local Lilly wholesalers). When Moore did not comply with this anti-competitive policy (to which all of Lilly's wholesalers had to adhere), Moore was denied the important discounts and payment terms on those products.

A second anti-competitive program was Lilly's "non-affiliation policy." All Lilly wholesalers had to agree in writing to this policy, which stated that Lilly would not sell to wholesalers affiliated with retail pharmacies. The rationale for the policy was that "wholesalers would act as retailers in making their purchasing decisions." The program was intended to prevent wholesalers from selling to retail accounts at too low a price. Lilly forced its wholesalers to agree to this policy in order to maintain further control over the prices at which its products were resold. Moore was allegedly terminated pursuant to this policy.

Moore ran afoul of more than these two anticompetitive policies. At one point, Moore began to advertise lower-priced generic drugs in its catalog. Lilly's district manager and sales representatives told Moore that Lilly was unhappy with pages listing Lilly's products and prices next to comparable generic products. Lilly asked him to stop. Lilly was the only manufacturer ever to make such a request of Moore. Again, Moore had to comply unwillingly in order to retain the Lilly line.

There was no hiding Lilly's dislike for Moore. It was Moore's claim that Lilly was waiting to find an excuse to terminate Moore, but one which was not on its face subject to legal exposure a second time. This theory is well-documented by the following hand-written memorandum sent by Harold Katz, the Lilly salesman in Moore's region, just a couple of years after Lilly took Moore on (After D. A. Rosow, a competing wholesaler, had submitted information to Katz):

> "Coincidentally, some of the information is what we were looking for several weeks ago. His motivation for leaving this with me? I'm sure he knows I'll send it along and subsequently another nail in H.L.M.'s box!!"

The memorandum travelled from the salesman to the Boston District Manager. From there, it was forwarded to the Eastern Region Assistant Sales Director. The memorandum ended up in Indianapolis in the hands of Robert Manning, who was in charge of all wholesaler accounts. Manning himself testified "... that only 'important' information would go up the ladder in this manner."

Then, in November, 1975, at a meeting of the National Wholesale Druggist Association, Moore became a topic of several Lilly-wholesaler conversations. Moore's parent company had purchased several Mall Drug Stores in 1974. There were a number of wholesalers at the NWDA meeting who anxiously brought Moore's affiliation to Lilly's attention. The evidence established beyond doubt that Lilly knew about the affiliation prior to the NWDA meeting. Lilly nonetheless thereafter agreed to a private meeting with Spectro Industries, a Moore competitor located in another territory. The meeting was held in Lilly's hotel suite in Acapulco, and was attended by Lilly's president and senior officers as well as the chief executives of Spectro.

The subject of Moore was the primary purpose of the meeting. Spectro asked Lilly point-blank if it was going to do something about Moore. Lilly agreed to "investigate," despite the fact that it had already learned of the affiliation earlier.

The jury heard the evasive testimony of Lilly's president, who said that he could not recall anything about his own decision to terminate Moore within weeks thereafter and that he could not say whether complaints from wholesalers about Moore selling at a lower price was a factor he took into account.

Nor could the three Lilly witnesses who testified about the Spectro meeting get their stories straight:

(a) Lilly's president acknowledged that Moore was discussed but claimed that the meeting took place openly over lunch rather than in a hotel suite.

(b) Mr. Manning testified, to the contrary, that the meeting was held in a private suite at the request of Spectro, in order to discuss Moore.

(c) Mr. Garde, Spectro's President, testified that he does not recall if Moore's name was ever even mentioned.

It was one month later that Lilly decided to terminate Moore. The jury properly found that the excuse Lilly immediately seized upon—the non-affiliation policy—was a pretext. The termination was effective as of June, 1976.

Moore filed this lawsuit that spring, alleging, *inter alia*, a violation of Section 1 of the Sherman Act[7], seeking damages and injunctive relief. The jurisdictional bases for the claim were Section 4 of the Clayton Act, 15 U.S.C. §§ 15 and 26 and 28 U.S.C. §§ 1331 and 1337.

The parties entered into a Consent Order pursuant to which Lilly sold to Moore on a C.O.D. basis pending the outcome of the trial.

Lilly moved for summary judgment, which was denied by Judge Sweet on the grounds that the evidence provided a sufficient inference of conspiracy. [Appendix A]. The case was then tried to a jury, which returned a special verdict in Moore's favor. The jury found that Lilly had conspired with its wholesalers to control resale prices and to restrict the territories in which Lilly products could be sold, and it awarded Moore $64,000.00 in damages.

A major portion of the trial was devoted to Moore's proof that the non-affiliation policy was merely a pretext for the termination, and that the termination actually resulted from Lilly's and

[7] Moore's other claims were either dismissed or withdrawn.

its wholesalers' long-standing desire to rid themselves of Moore.[8] Moore's termination was thus found by the jury to have occurred in furtherance of the illegal conspiracy.

Lilly moved for judgment *n.o.v.* or for a new trial on a number of grounds, including the sufficiency of the conspiracy evidence. Judge Sweet denied the motion, properly deferring to the jury's findings. [Appendix B].

The trial court later held a hearing relating to Moore's request for an injunction. At that hearing, Lilly's President testified that Lilly still would refuse to deal with Moore. He used the non-affiliation policy as the excuse. Moore was granted an injunction requiring Lilly to sell to Moore for one year. The injunction additionally prohibited a cessation of dealings for three years based upon any retaliatory reasons or for any reason violating the antitrust laws. [Appendix C]. Final judgment was entered on January 28, 1981.

Lilly appealed from the judgment and injunction. The Second Circuit reversed, directing entry of judgment for Lilly. [Appendix D]. Instead of dealing with the conspiracy that the jury found, the Court spent most of the opinion explaining why it did not believe Moore's evidence proved a general conspiracy. The Court devoted a summary half-page treatment [Appendix D, p.A96] to the real claim upon which Moore prevailed: a Lilly scheme to restrict resale prices and territories to which the other

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[8] As the District Court found:

"A considerable part of the proof at trial related to Lilly's non-affiliation policy. Briefly stated, Lilly asserted that it would not sell its products to any wholesaler affiliated with a retail pharmacy, claiming that this prohibition was necessary to maintain the integrity of the distribution process. Plaintiff vigorously contested this assertion and sought to establish that the non-affiliation policy was a sham, at least as it applied to Moore in these circumstances. Although Lilly had notified its wholesalers of its policy by a letter dated October 23, 1973, there was sufficient evidence to support plaintiff's view of the non-affiliation policy, since the testimony revealed that this 'policy' was not stringently enforced against other 'violators' such as Rogers Wholesale Drugs (Tr. 68, 217-20, 259, 482-85); Kiefer-Stewart Company (Tr. 68, 225, 479-82); and Kaufman-Lattimer Co. (Tr. 214-17, 486-95). Although Lilly offered explanations for each of these 'exceptions' to the rule, they need not have been credited by the jury." [Appendix B, p. A30].

wholesalers adhered, and pursuant to which Lilly coerced Moore (through the Special Deals, the visit to stop generic drug advertising, and the termination itself)—*i.e.*, a conspiracy recognized by this Court in *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960) and in subsequent decisions. In its one paragraph discussion of the evidence, the Second Circuit ignored much of Moore's proof and permitted no inferences.

The Court of Appeals based a major part of its decision on Lilly's Mr. Manning, testimony which was contradicted by reasonable inferences drawn by the trial judge and jury alike.[9] It also held that the record was "devoid" of proof of any anti-competitive policy. The Opinion ignored in its discussion of the conspiracy evidence two of the factors upon which the trial judge stated he relied: the turbulent twenty-year history of Lilly's refusals to deal with Moore and the effect of Moore's prices on other wholesalers. The undeniable impact of the nail-in-the-box and Spectro evidence was neutralized by the Court.[10] Instead, it required direct proof of an agreement with Spectro or of an agreement to control resale prices.

Moore's petition for rehearing was denied without opinion on December 30, 1981. Moore argued that, with the new direct evidence requirement, it should at least be permitted a remand for the trial court's consideration of a new trial motion. That motion would be based, in part, upon exclusions of direct evidence which Moore did not challenge as the verdict winner. See footnotes 5 and 6, *supra*.

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[9] For example, the Court finds as a *fact* that the "nail-in-the-box" evidence was "unimportant" because Mr. Manning so stated. Lilly purposely never called the author of the note to testify. [Appendix D, p. A88].

[10] The Court found that:

"[T]he 'nail-in-the-box' memorandum . . . had [nothing] to do with prices and territories . . ." [Appendix D, p. A98].

This gives Lilly the benefit of all inferences. It is surprising that the Opinion fails to mention Mr. Katz' (the author of the note) testimony that " . . . price was *always* involved" in Rosow's complaints (A342) [emphasis added]. Moreover, Rosow told Lilly that he was upset about having Moore in "his" trading area [A334]. At oral argument, the Court wrote off this evidence by asking:

"They told all their seventeen hundred salesmen to go looking for nails?" [Transcript of Oral Argument, p.30].

Because of the inconsistencies in procedure under Rule 50(d) of the Federal Rules of Civil Procedure, Moore, as a verdict winner, was unable to obtain a remand. This petition requests a ruling that verdict winners are entitled to the same opportunity for a hearing by the trial court as that afforded verdict losers.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision draws into conflict two statutory issues which should be resolved by this Court. The first is whether a plaintiff must have direct evidence of a "contract, combination or conspiracy" in order to prove a vertical Sherman Act conspiracy. The second issue arises from an apparent ambiguity in this Court's interpretation of Rule 50 of the Federal Rules of Civil Procedure. Because of that ambiguity, verdict winners who are reversed on appeal are afforded less protection than verdict losers in terms of the right to have the trial judge consider a new trial motion.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT IS ERRONEOUSLY REQUIRING DIRECT EVIDENCE IN ORDER TO PROVE A VERTICAL ANTITRUST CONSPIRACY

This case squarely presents an issue which underlies many Sherman Act Section 1 decisions since 1977, the year in which this Court handed down its decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.* That decision involved a contractual provision which constituted the "contract, combination or conspiracy." The opinion was devoted in large part to how courts should analyze the reasonableness of vertical conspiracies. The Second Circuit has apparently read the decision to require a focus on the latter inquiry. It has ruled out circumstantial

evidence in proving the "conspiracy" in such cases, leaving for the jury the factual question of reasonableness.[11] This has effectively turned the "combination or conspiracy" issue into a legal one, requiring direct evidence (*e.g.*, in the form of a contract) for that part of the proof.

The Second Circuit's treatment of conspiracy evidence flatly contradicts the teaching of this Court, which firmly established that proof of a vertical "combination or conspiracy" could be in the form of circumstantial evidence. *See* L. SULLIVAN, ANTITRUST § 109 at 314 (1977). As part and parcel of that trend, the lower courts were instructed to look beyond isolated facts to the "mosaic" of inferences that conspiracy proof often requires. *Continental Ore* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

This standard has been particularly important in the context of vertical conspiracy cases of the type found in *United States* v. *Parke, Davis & Co.*,[12] *Simpson* v. *Union Oil Co.*,[13] and *Albrecht* v. *Herald Co.*[14] These cases held that an anticompetitive policy (such as imposing minimum resale prices) could rise to the level of a prohibited combination if plaintiff proved a "course of dealing" adhered to by most of the manufacturer's customers, and some coercion related thereto. Professor Sullivan has summarized these cases as follows:

> "[I]f the manufacturer receives reports from retailers about the pricing policies of others and implies to them that it will take appropriate action, it will have done 'something more' than merely to announce its policy and then refuse to deal." L. SULLIVAN, *Antitrust* § 139 at 395.

The Second Circuit says that none of the foregoing elements is present in this case. Its analysis is found on page 945 of the

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[11] *See also Schwimmer* v. *Sony Corp. of America, supra.*

[12] 362 U.S. 29 (1960).

[13] 377 U.S. 13 (1964).

[14] 390 U.S. 145 (1968). In *Albrecht*, the Court even suggested that a conspiracy could be proven merely by establishing that plaintiff unwillingly complied with a manufacturer's anticompetitive policy. 390 U.S. at 150 n.6.

decision [Appendix D, p. A97]. That Court did not always decide this way. In early 1977, just before *GTE Sylvania*, the Second Circuit upheld, in *Jacobson* v. *Armstrong Cork Co.*, 548 F.2d 438 (2d Cir. 1977), the granting of a preliminary injunction against termination of a distributor where the evidence was of: (a) customer complaints about plaintiff's presence in another territory; (b) an interoffice memo discussing the complaints; and (c) plaintiff's termination closely following complaints by two other distributors.

GTE Sylvania intervened and the standards changed.[15] In the instant case, Moore presented evidence similar to that adduced by Jacobson: complaints; a termination closely following complaints; an interoffice memo discussing the complaints; a pattern of conduct showing the manufacturer's policy of preventing extra-territorial sales (or heavy discounting); and a defense of "adequate distribution." In the *Moore* case, there was the added proof of the anti-competitive Special Deal and non-affiliation policies to which all distributors adhered.

The Second Circuit nonetheless reached the *opposite* result in *Moore*. It found "the record devoid of proof" (Appendix D, at p. A97) on coercion, price and territorial restraints. That is because it did not look for inferences. The only explanation for this machine-gun rejection of Moore's proof is that the Second Circuit decided that the conspiracy evidence had to be direct [*Id*].

(1) Lilly's Anti-competitive Policies and Adherence by Wholesalers

(a) The Opinion

"THERE IS NO EVIDENCE THAT EITHER THE "NAIL-IN-THE-BOX" MEMORANDUM OR THE SPECTRO MEETING HAD ANYTHING TO DO WITH PRICES AND TERRITORIES."

"ACCORDING TO MR. MANNING, WHILE THE ARTICLE MAY HAVE BEEN IMPORTANT, THE ATTACHED MEMORANDUM WAS 'UNIMPORTANT.'"

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[15] *See, e.g., Borger* v. *Yamaha Int'l Corp.*, 625 F.2d 390 (2d. Cir. 1980).

"THE KATZ MEMORANDUM WAS NO MORE THAN A CASUAL, HAND-WRITTEN NOTE BY ONE OF OVER 1,200 LILLY SALESMAN . . . THE IMPORTANT ITEM WAS THE ARTICLE . . ." [Appendix D, pp. A88, 98].

The Facts

These crucial pieces of evidence have everything to do with prices and territories. Moore's competitive sales practices were the reason both occurred. The written memorandum was clearly the important document which Mr. Manning saw—Lilly already knew about what was in the attached article. The memorandum was a "smoking gun" which the court should have acknowledged. Instead, Judge Mansfield just accepted Lilly's officer's testimony as a definitive fact, removing all inferences and credibility judgments from the jury.

The Court insists that the note reflects Rosow's motives. But Lilly's failure to call Mr. Katz (the author of the note) as a witness leaves a single inference—that the motive belongs to Lilly. This evidence proved that Rosow was "reporting a violation" of Lilly's anticompetitive policies; that Rosow had obtained responses from Lilly before; and that Lilly was continually looking for a viable termination pretext in order to get rid of the "thorn" in Lilly's side.[18]

A final aspect of the "nail-in-the-box" bears noting. The article attached to that memorandum dealt with Moore's affilia-

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[18] The Second Circuit nonetheless chose to neutralize the evidence altogether:

"[T]here is no connection between the events in 1974 and Lilly's termination of Moore two years later." [Appendix D, p. A94].

In other words, the Second Circuit adopts the false premise that Moore is trying to prove with this evidence that there was a conspiracy in 1974 to eliminate Moore that did not work until 1976. The truth is that the conspiracy was one by Lilly to impose vertical resale restrictions on prices and territories, to which its wholesalers adhered. Moore did not adhere, so Lilly used coercion (the Special Deal refusals, the visit concerning price advertising, and ultimately the termination) to obtain compliance. The "nail-in-the-box" shows that the other wholesalers were performing their "reporting" functions and that Lilly was looking for ways beyond the Special Deals to coerce Moore's adherence.

tion with Parkway. Lilly knew of this affiliation at the time it franchised Moore, both because it appeared in Moore's annual reports and because Parkway was the signatory to Moore's distribution agreement. Lilly never objected to this affiliation. The Second Circuit inexplicably found on this issue that:

> "Parkway's ownership of the Big L stores was *not known to Mr. Manning*, the Lilly executive in charge of wholesale relations, until late 1973 or early 1974."

This is, of course, irrelevant to *Lilly's* knowledge or to the obvious inference the jury was entitled to believe—*i.e.*, that Lilly did not have a concern about affiliations at all. The real concern was Moore's prices.

Spectro

As with the "nail-in-the-box," the Second Circuit neutralized this evidence by concluding that:

> "There is no evidence of any agreement at the meeting relating in any way to Moore's termination . . ." [Appendix D, p. A67].

No such agreement was necessary in order to support the jury's Section 1 verdict.

The jury could reasonably infer that this meeting was held to report the problem of Moore, and that Lilly responded. The trial judge himself so found [Appendix B, p. A39.] It is crucial to note, as the district court did, that this evidence was not utilized to prove that Lilly and Spectro conspired to terminate Moore [*id.*]. Rather, this evidence permitted the jury to infer that other wholesalers complained about Moore because of Moore's violation of the anticompetitive Lilly policies. That inference is hardly "speculative," since Lilly conceded that it was met by a number of wholesalers with comments about Moore. It is also a reasonable inference because Moore would have been of little concern to the other wholesalers were it not for the fact that Moore competed in those wholesalers' territories (and necessarily charged lower prices than the local wholesaler).

The most that the Second Circuit could say was that the inconsistencies among Lilly's witnesses' version of the meeting were "understandable."

(b) The Opinion:

> MOST LILLY WHOLESALERS SELL WITHIN A LOCAL AREA ONLY BECAUSE OF NATURAL LIMITATIONS ON THE SERVICES THEY CAN PROVIDE.

The Facts

The Special Deal was not a natural limitation. Lilly had the great majority of its wholesalers in territories insulated from competition. That was the reason for the complaints due to Moore's sales in other territories. This explains why Moore was a "thorn in Lilly's side" (page 7, *supra*), a fact communicated to Moore by Lilly itself. That is also the reason that Rosow felt angered that Lilly franchised Moore in Rosow's "trading area." The Court again rejected all of Moore's testimony and all of the inferences in Moore's favor.[17]

(c) The Opinion

> MOORE'S CLAIM THAT LILLY HAD POLICIES RESTRAINING RESALE PRICES AND TERRITORIES WAS "SPECULATION." [Appendix D, AT p. A81].

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[17] The Court also ignored the fact that Lilly could monitor its wholesalers' sales. The Special Deals required the wholesalers to report to Lilly the ultimate retail purchaser before credit was given. By obtaining the wholesaler's invoices, Lilly monitored the type of customers and prices at which the special merchandise was sold. Lilly also had means beyond the Special Deals to monitor where wholesalers resold Lilly products. Few wholesalers other than Moore sold outside of their territory. Lilly had records of its sales to wholesalers in each territory. By virtue of the Distribution Data service, Lilly also had a record of *all* Lilly retail sales made in each territory by zip code. It was consequently not difficult for Lilly to ascertain from the foregoing information (combined with local sales representatives' reports and Special Deal reports) the source of inter-regional sales. This testimony comes from Jerald Rome, a Moore officer, and should have been credited by the Court.

The Facts

Moore did not claim that it "speculated" as to those policies. This characterization by the Court assumes its conclusion before the evidence is even discussed. The Special Deals are not "speculation"; they constitute documentary proof of Lilly's resale price and territorial restrictions. The Special Deals expressly prohibited transshipping by Lilly wholesalers to other wholesalers and, as Lilly's Mr. Katz testified, the purpose was to prevent "unfair competition" caused by lower prices. This was a policy signed by all wholesalers. This was a major part of the evidence upon which Judge Sweet relied. The Second Circuit never discusses this as proof going to the conspiracy.

Lilly's twenty-year refusal to deal with Moore and the attendant supplier cut-offs are far from "speculation." But the Second Circuit fails even to acknowledge this evidence in its conspiracy discussion. What is more, the Second Circuit opinion flatly states as a finding of fact that Lilly's earlier refusal to sell was based upon *Lilly's* proffered reasons. [Appendix D, p. A60]

The non-affiliation policy is not speculation. The jury found that Lilly was not really concerned with such affiliations, and that the policy was a pretext for Lilly's real reason. That reason is what Lilly admitted—that the policy served to prevent lower resale prices to affiliated retailers. Lilly's price tampering is anti-competitive. This policy was signed and adhered to by all wholesalers.

The opinion claims "speculation" because there was evidence that "the majority of Lilly items were being sold by Lilly wholesalers below the suggested retail prices." That was Lilly's testimony. There was also evidence that other wholesalers sold at prices higher (and therefore closer to the suggested price) than did Moore; that Lilly considered it "unusual for anything except a slow-moving item not to be sold at a suggested price"; that resale prices were published with the expectation that they could be followed; that other manufacturers do not use suggested resale prices; that other wholesalers have been subjected to "economic bruising" because of Moore's lower prices; and

that if there were an increase in discounting competition caused by wider distribution of the Lilly line, it "would probably cause the bankruptcy of a lot of wholesalers." The fact that net resale prices were not precisely adhered to does not vitiate the value of this evidence. *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979).

Thus, while the opinion states that "there was testimony disputing the claim that Moore's prices were the lowest," on a motion for judgment *n.o.v.* that type of credibility finding is properly one that should have gone to the jury. The Second Circuit exceeded the scope of its appellate review function.

(2) Coercion

(a) The Opinion

"... THE RECORD IS DEVOID OF PROOF THAT LILLY SOUGHT TO ENFORCE THESE PRICES THROUGH ACTIVE COERCION OR ANY OTHER MEANS."

"... NO EVIDENCE OF ACTUAL OR THREATENED TERMINATION" [Appendix D, at p. A97].

The Facts

There were twenty years of coercion. Judge Mansfield makes not a single mention of the prior dealings, of the cut-off of Moore's suppliers, or of the repeated false excuses Lilly used in its refusal to sell to Moore.

Most startling, however, is the ability of the court to ignore the termination itself. Moore was coerced when it was terminated. Lilly's furnishing of a false reason provided a very important inference for the jury: that Lilly did not want to let Moore know the real reason it was terminated, and that the real reason was one that Lilly had to hide.

> "Thus, because the jury was entitled to reject Fox's proffered explanations of its conduct the jury could also conclude that it would be irrational for Fox to completely refrain from licensing its films to plaintiffs unless it received some hidden benefit from doing so."

Beech Cinema, Inc. v. *Twentieth Century-Fox Film Corp.*, 622 F.2d 1106, 1109 (2d Cir. 1980).

As in *Beech Cinema*, the jury here was entitled to disbelieve Lilly's proffered reason for its conduct. Lilly voiced concern that if all wholesalers discounted as heavily as did Moore, "it would probably cause the bankruptcy of a lot of wholesalers" with a resultant destruction of Lilly's distribution system. By eliminating Moore, the major nationwide discounter, the hidden benefit to Lilly was the maintenance of trading areas for its wholesalers which were insulated from serious price competition.

Nor did the jury have to find that Lilly's unlawful motive was the sole motive for the termination, as long as that motive substantially contributed to the termination. *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832, 837 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961); *Untroyal, Inc.* v. *Jetco Auto Service*, 461 F.Supp. 350, 355 (S.D.N.Y. 1978); *Phillips* v. *Crown Central Petroleum Corp.*, 395 F.Supp. 735, 769 (D.Md. 1975). The jury was fully entitled to infer that Lilly's false reason was another in a series of pretexts used to avoid Moore's national, deep-discount sales.[18]

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[18] Supporting these inferences are the following facts:

(a) Moore was the *only* wholesaler ever terminated under this 84-year old "policy";

(b) At or about the time Moore became a Lilly wholesaler, Moore was affiliated with Northeast Medical Supply Company, a large-volume retail pharmacy. Lilly knew of this affiliation but never objected. Northeast Medical Supply Co. was later sold to Newman Wholesale Drug. Lilly then conceded that Northeast was a "violative" affiliation, for in the midst of the trial Mr. Manning called Newman to advise them that they would be terminated unless Northeast was divested.

(c) Lilly knew that Moore was affiliated with the Big L stores and did nothing about the affiliation since 1971.

The Second Circuit accepted Lilly's explanation, and denied Moore all inferences:

"Mr. Manning testified that this brief reference made no impression on him at the time and that as a result Lilly never made a determination whether the Northeast affiliation violated Lilly's policy. Thus, with respect to both the Big L and the Northeast affiliations, Lilly did not understand Moore then to be in violation of the non-affiliation policy."

"Manning . . . testified that he completely overlooked the Northeast affiliation as a possible violation of Lilly's policy." [Appendix D, pp. A64, 93].

The jury was also entitled to find coercion by virtue of the consequences of Moore's alleged violation of the nonaffiliation policy. That policy was used to control prices. Whether it was the real reason or not, the termination was coercive.

Moore was similarly coerced when it was unable to obtain Special Deal merchandise.

Moore was coerced when Lilly's district manager and salesman paid Moore a visit to inform him that it "made Eli very unhappy" when Moore advertised lower-priced generic drugs in its catalog near the higher-priced Lilly items. Lilly explicitly asked Moore to stop this practice, which Moore did.

The Second Circuit has refused to accept any inferences and has chosen to ignore the evidence conflicting with Mr. Manning's testimony. Lilly had anticompetitive policies to which its wholesalers adhered. Lilly coerced Moore in several respects. The absence of direct evidence of the "combination" should not have taken the verdict from Moore.

II

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A COURT OF APPEALS, UPON SETTING ASIDE A VERDICT, MAY DEPRIVE THE VERDICT WINNER OF AN OPPORTUNITY TO MAKE A MOTION FOR A NEW TRIAL IN THE DISTRICT COURT WHERE:

1) **the reversal by the Court of Appeals was based upon insufficiency of evidence; and**

2) **the district court excluded evidence which would have strengthened the verdict winner's case and could have provided the margin of difference.**

Certiorari is required in order to resolve what appears to be a contradictory series of decisions by this Court. The contradiction has left in doubt the right of a verdict winner to make a motion

for a new trial in the district court after his verdict has been set aside by a Court of Appeals. Rule 50(c) of the Federal Rules of Civil Procedure authorizes a verdict winner to make a motion for a new trial as a matter of right in the district court, if the district court grants the other party's motion for judgment notwithstanding the verdict. Similarly, under Rule 50(b), the verdict loser has the same right to a hearing in the district court. But in this case, where the verdict was set aside on appeal, the verdict winner was deprived by the Court of Appeals of an opportunity to make the same motion in the district court.

This result is both illogical and unfair. Moore, the prevailing party in the district court, has thus been denied the opportunity to invoke the district court's discretion in determining the new trial question. The verdict loser was, on the other hand, guaranteed that right. In effect, Moore has been penalized for having won the verdict in the first instance.

The district court excluded certain evidence of the conspiracy at trial. There is no doubt that this evidence would have strengthened Moore's case. It is significant that the exclusion came after the court had previously denied summary judgment to Lilly, holding that Moore had enough admissible evidence to raise a question of fact for the jury.

The evidence excluded at trial would have shown that an "industrial spy" working at Moore had reported to Lilly the identities of Moore's secondary (and sole) suppliers of Lilly products.[19] Immediately thereafter, these sources stopped dealing with Moore. [page 6, *supra*]. From this evidence and the surrounding circumstances, the jury could have reasonably inferred that Lilly intended to engage its dealers in its effort to maintain prices and restrict territorial markets.

The other excluded evidence was testimony that even after Lilly reluctantly agreed to sell directly to Moore, it continued to have a common understanding with complaining customers that Moore's discounting and inter-territorial sales were a "thorn" in

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[19] The district court excluded this evidence on the theory that, although relevant, its prejudice to Lilly outweighed Moore's need for the evidence.

Lilly's side. [page 7, *supra*][20] The district court's exclusion of this evidence was made, at least in part, in light of its summary judgment holding that there was otherwise enough evidence to support a jury inference of conspiracy.

The Second Circuit, however, found that the evidence which did go to the jury was insufficient. Moore's petition for rehearing raised these new trial issues and asked for an opportunity to make a motion for a new trial in the district court. The Second Circuit, in a *pro forma* denial, refused to allow the requested remand.[21] The net result is that the Second Circuit, in applying its evidentiary standard for proof of antitrust conspiracies, has deprived Moore of an opportunity to ask the district court to reconsider whether its earlier exclusionary rulings should be altered in light of the fact that such evidence could have provided the margin of difference.

Under the early decisions of this Court, after the adoption of Rule 50, there would have been no doubt that the result reached by the Second Circuit would have been contrary to law. This Court placed great emphasis on preserving the rights of the verdict winner to make a motion for a new trial in the district court after the verdict is set aside on appeal. *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949); *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571 (1948); *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); and *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243 (1940). The *Cone* Court emphasized that:

> "Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. . . . Exercise of this discretion presents to the

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[20] The court excluded this evidence "for the time being" on theory that it was hearsay, despite the fact that it was uttered by Lilly's salesman who handled Moore's account.

[21] The denial of the petition left intact the Court's direction that judgment be entered dismissing the complaint.

> trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone."
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> "Furthermore, [holding otherwise] would present the question initially to the appellate court when the primary discretionary responsibility for its decision rests on the district court." 330 U.S. at 216, 218 [citations omitted].

The issue which arises in the instant case stems from certain language in this Court's subsequent decision in *Neely* v. *Martin K. Eby Constr. Co., Inc.*, 386 U.S. 317 (1967). The Court held that, where the verdict winner upon reversal failed to ask the Court of Appeals for an opportunity to make a motion for a new trial, the Court of Appeals did not err in its direction that judgment be entered dismissing the complaint.

Although authorizing the Court of Appeals to entertain a request for a remand, 386 U.S. at 329, the Court was careful to emphasize that it was not abandoning its prior rule that the discretionary disposition of new trial issues is one which ordinarily should be resolved at the district court level. Citing with approval the earlier landmark decisions in *Cone*, *Globe Liquor* and *Weade*, Justice White explained:

> "[W]here the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. Although many of the plaintiff-appellee's possible grounds for a new trial, such as inadequacy of the verdict, will not survive a decision that the case should not have gone to the jury in the first place, there remain important considerations which may entitle him to a new trial. The erroneous exclusion of evidence which would have strengthened his case is an important possibility." 386 U.S. at 327.
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> "Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's first-hand knowledge of witnesses, testimony, and issues—because of his 'feel' for the overall case. These are very valid concerns to which the court of appeals should be constantly alert." 386 U.S. at 325.[22]

Neely, however, left unresolved the critical question of whether the Court of Appeals, in circumstances which would otherwise be appropriate for the exercise of the district court's discretion, may itself act upon and deny the request for a new trial on the merits. *Dictum* in Justice White's opinion suggested that may have in fact been what the Court meant:

> "[T]he court of appeals may make final disposition of the issues presented, except those which in its informed discretion should be reserved for the trial court." *Neely*, 386 U.S. at 329.[23]

The dictum in *Neely*, however, was thrown into doubt only two months later by this Court's *per curiam* decision in *Iacurci* v. *Lummus Co.*, 387 U.S. 86 (1967). In *Iacurci*, the Court of Appeals set aside the verdict and directed the entry of judgment against the verdict winner. This Court reversed the direction that judgment be entered, holding that the new trial issues in the petition for rehearing in the Court of Appeals compelled a remand to the district court for consideration of a motion for a new trial:

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[22] The decision has been described as stating "an inclination towards reserving for the discretion of the trial court disposition of those issues more appropriately addressed to it." 5A MOORE'S FEDERAL PRACTICE, ¶ 50.15 at p.50-128 (1982).

[23] The exercise of "informed discretion" by a Court of Appeals in determining the merits of new trial issues is contrary to the traditional rule. Typically, the Court of Appeals' review of the trial court's discretion in ruling on a motion for a new trial is limited by the abuse-of-discretion standard. *See Neely*, 386 U.S. at 338 (Black, J., dissenting).

> "Under these circumstances, we think the Court of Appeals erred in directing entry of judgment for respondent; the case should have been remanded to the Trial Judge, who was in the best position to pass upon the question of a new trial in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers. Fed Rule Civ Proc 50(d). See Neely v. Eby Construction Co. 386 US 317, 18 L ed 2d 75, 87 S Ct 1072; Weade v. Dichmann, Wright & Pugh, Inc., 337 US 801, 93 L ed 1704, 69 S Ct 1326." *Iacurci*, 387 U.S. at 88.

The uncertainty surrounding the meaning of the *Neely* and *Iacurci* decisions should be dispelled by the grant of *certiorari* in this case.

It has been suggested that *Neely* and *Iacurci* are irreconcilable. *See Post-Verdict Motions Under Rule 50: Protecting The Verdict Winner*, 53 Minn. L. Rev. 358, 374 (1968); *Civil Procedure-Federal Rule 50(d)—Disposition of Cases by the Court of Appeals After Granting Judgment Notwithstanding the Verdict*, 47 N.C.L.Rev. 162 (1968). *See also Iacurci*, 387 U.S. at 88-89 (Harlan, J., dissenting).

On the other hand, Justice White, the author of the *Neely* Opinion has emphatically stated, albeit in another context, that *Neely* was fully consistent with the earlier cases which held that the trial court is the most appropriate tribunal to determine a factual new trial motion. *United States* v. *Generes*, 405 U.S. 93 (1972) (White, J., concurring in part, dissenting in relevant part). *Compare Pullman Standard* v. *Swint*, 50 U.S.L.W. 4425, 4430 (U.S. April 27, 1982) (in the context of bench trials); *cf. Gough* v. *Rossmoor Corp.*, 533 F.2d 453 (9th Cir. 1976); *O'Hare* v. *Merck & Co.*, 381 F.2d 286, 293 (8th Cir. 1967) (Lay, J., dissenting).

The Second Circuit appears to have adopted the practice of denying as a matter of course applications for a new trial when raised in petitions for rehearing. The court is, in effect, prohibiting the exercise of discretion by the district court, as required by *Iacurci* and the earlier cases. Petitioner respectfully submits

that an interpretation of *Neely* which allows the Second Circuit to do so is inconsistent with basic notions of procedural fairness.[24]

This Court should, therefore, grant certiorari to resolve definitively this fundamental issue. If *Neely* and *Iacurci* are indeed irreconcilable, the Court should resolve that conflict.

If, on the other hand, *Neely* was not intended as a departure from earlier case law, then certiorari should be granted in order to correct the action taken by the Court of Appeals. In either event, this Court should exercise its supervisory jurisdiction in order to remedy the practice pursuant to which the Courts of Appeal may effectively deny the verdict winner an opportunity to make a motion for a new trial.

CONCLUSION

It is respectfully requested that a writ of certiorari issue to review the judgment of the United States Court of Appeals.

Respectfully submitted,

MILTON A. BASS
JACOB LAUFER
I. SCOTT BASS
LAWRENCE H. ROTH
Bass Ullman & Lustigman
Attorneys for Petitioner
H. L. Moore Drug Exchange

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[24] Rule 50 evidences a strong intent to preserve the right to invoke the discretion of the district court by any party who feels that he is entitled to a new trial. The procedure sanctioned by the Second Circuit has the result of guaranteeing that right only to the party who loses in the district court and not to the party who in the first instance prevails. Also, the nature of the appellate process is such that presentation of a new trial issue is not likely to be raised by the verdict winner unless and until the appellate court has ruled against him. Unless the Court addresses the issues *sua sponte*, the disfavored petition for rehearing becomes the only practical vehicle for asserting the new trial claim. This places the former verdict winner at a virtually insurmountable tactical disadvantage.